Supreme Court, U.S.
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No. 90-1681

In The

Supreme Court of the United States

October Term, 1990

ROBERT D. HODORY,

Petitioner,

v.

JOHN HAMILTON,

Respondent.

Petition For A Writ Of Certiorari To The Florida District Court Of Appeal For The Second District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Florida courts refused to recognize Hodory's federal rights and controlling case law?

2. Whether the Florida courts deprived Hodory of his federal rights where, in granting summary judgment, they disregarded controlling precedent from this Court?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Florida District Court of Appeal for the Second District were petitioner Robert D. Hodory and respondent John Hamilton.

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*These statutes are re-printed in the Appendix.

JURISDICTION

Petitioner has mistakenly relied on 28 U.S.C. § 2104 (1988) for jurisdiction for this Court to review the final decision of the Second District Court of Appeal. Respondent presumes that Petitioner intended to seek jurisdiction for review based upon 28 U.S.C. § 1257 (1988).

STATUTES INVOLVED

The statute principally involved in the decision is the Securities Act of 1933, relevant portions of which are reproduced in the Appendix.

STATEMENT OF THE CASE

HAMILTON adopts HODORY'S statement of the case with the following noted additions and exceptions.

The Contract to Sell

Although contact first occurred in the fall of 1985 on the stock offering of Weiss and HAMILTON, sole stockholders of the company, there was no contract consummated from this first offering. In January, 1986, after the corporation was restructured with HAMILTON, as the sole remaining stockholder, HODORY was offered and sold the HAMILTON stock. With respect to this offer, no announcements were published, nor was there any other form of solicitation.

HAMILTON contracted with HODORY for the sale of his stock in Weiss-Hamilton Lumber Company, Inc., on May 5, 1986. There was an investigation period following contract for verification of the financial condition of the company. HODORY was represented by counsel and had an accountant who assisted him in verifying the company finances. After the due diligence period, the contracts were closed on June 16, 1986.[1]

An integral part of the stock purchase agreement is paragraph 23 (Appendix 3), which provided that the sale was an "isolated transaction" and that the parties agreed that it "was exempt from securities laws." Their agreement also required that HODORY "verify the accuracy" of the financial information as a condition of closing (paragraph 3A) (Appendix 1). HODORY had the "absolute discretion" to terminate the agreement (paragraph 7) (Appendix 2). HODORY agreed to perform all that was required in their agreement (paragraph 5) (Appendix 1) and HAMILTON justifiably relied on their agreement. As part of the agreements, HAMILTON remained as a management employee of the company. Part of the purchase price was assigned to the non-compete agreement and a part financed by a purchase money note. The note matured on June 16, 1987.

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[1] The documents were quite extensive and included a Stock Purchase Agreement, Stock Pledge Agreement, Employment Agreement, Covenant Not to Complete Agreement, Promissory Note and Assumption of Guarantees.

The Circuit Court's Decision

HODORY filed the complaint on June 3, 1987. Between the closing and filing of this suit, HODORY was the sole shareholder and controlled management of the company as the CEO and chairman of the board of directors. In addition, he brought in his own team of senior management. Thus, the transaction was a sale of the entire business, together with the sale of stock.

HODORY obtained a temporary injunction, upon filing his complaint, that remained in force until a final judgment was entered dissolving it. HAMILTON filed counterclaims seeking the balance of monies due on the defaulted purchase money note and non-compete agreement. The injunction prevented HAMILTON from exercising his rights to the stock under the pledge agreement and left HODORY in control of the corporation through the course of the litigation.

HODORY filed his motion for partial final summary judgment on June 30, 1988, with an attached memorandum of law which set forth the grounds for the motion. It sought an order granting the rescission remedy on the federal claims for failing to register the stock and misrepresentation of material facts. (Counts IV and V). In support of the motion he filed only a single affidavit showing non-registration and a corporate resolution.

HAMILTON filed his motion for partial summary judgment on June 27, 1988, which was amended on August 19, 1988. He sought partial summary judgment on his defenses that the stock sale was exempt from registration under both federal and state statutes, that HODORY was estopped from asserting the statutory registration

and fraud claims, and that the federal registration claim was barred by the one-year statute of limitation.

HAMILTON filed a second motion for partial summary judgment on November 14, 1988. It sought a ruling on those factual allegations of the amended complaint of which HODORY had prior knowledge and summary judgment on those allegations not supported by any evidence after 17 months of litigation and extensive discovery. It asked for dismissal of the rescission remedy.

In support of his motions, HAMILTON filed numerous affidavits, the depositions of the parties and miscellaneous correspondence between counsel. HAMILTON propounded extensive interrogatories on these allegations prior to a hearing on the motion, but they remained unanswered at the time of that hearing.[2]

On January 27, 1989, the trial court entered a partial summary judgment on HAMILTON'S motion of August 19, 1988. And, on March 7, 1989, an order was entered granting, in part, HAMILTON'S motion of November 14, 1988 (Appendix 4). HAMILTON'S counterclaims were tried on February 27, 1989 and final judgment was entered on July 21, 1989. It includes final judgments on HAMILTON'S counterclaims, breach of promissory note, breach of covenant not to compete and breach of the stock pledge agreement.

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[2] These interrogatories were the subject of proceedings to compel from August to the time the answers were filed, on February 6, 1989, after the hearings on the motions for partial summary judgment.

The District Court of Appeal's Decision and Subsequent Filings

The facts on which HAMILTON'S counterclaims are based and the judgments on the counterclaims were not argued as error in HODORY's appeal. He argued error only in the rulings made by the trial court's partial summary judgment, which was the basis for the final judgment denying his amended complaint.

On appeal the trial court decision was affirmed in a per curiam opinion on December 14, 1990. HODORY'S motion for rehearing was denied. On April 12, 1990 HODORY also filed suit in the United States District Court for the Middle District of Florida. The parties filed a stipulation to abate this action pending the outcome of HODORY's appeal. An order granting the stipulation was entered July 5, 1990. As of this date, although the appeal in state court has been completed, HODORY has done nothing more on his federal action.

Subsequently, HAMILTON in the course of executing the judgments was approached by HODORY. HODORY offered HAMILTON $30,000.00 toward payment of the judgment if he would forebear for 60 days so that he could make other arrangements for payment. HAMILTON agreed, only to find that HODORY now seeks a writ from this Honorable Court.

REASONS FOR DENYING THE WRIT

1. **The Writ Should Be Denied Because the Florida Courts Properly Considered the Petitioner's Federal Rights and Controlling Precedent from this Court.**

2. **The Writ Should Be Denied Because Petitioner was Not Deprived of Federal Rights.**

Exemption from Registration. In arguing that the Florida courts have disregarded controlling precedent from this Court, Petitioner relies upon a misstatement of the decision in *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985), by stating that the sale of all of a company's stock is subject to the securities acts. (p.5) In fact, the Court itself limited it's decision to "the question whether the sale of all of the stock of a company is a securities transaction subject to the anti-fraud provisions of the federal securities laws." *Landreth* at 683. Thus, *Landreth* is not controlling here as to whether the sale of all of the stock of a company is a securities transaction subject to the registration requirements of 15 U.S.C. § 77(d) or civil liability for non-registration under 15 U.S.C. § 77(e). Recall, that the basis for HAMILTON'S motion for partial summary judgment on the claim for non-registration was that the transaction was exempt, that the claim was barred by the statute of limitations, and that HODORY was estopped from asserting the registration claim.

The order of the Florida court with respect to non-registration of the securities did not rely on *Landreth* and there is no conflict with this Court's holding in that decision. Rather, in adopting the legal arguments set forth in HAMILTON'S Memorandum, the Florida court relied upon undisputed facts and correctly applied the

"sale of business doctrine" which continues to apply to the federal registration requirements where the stock issue possesses all of the characteristics of stock, but the stock could not be a security because managerial control of the business has passed into the hands of the purchaser, and, thus, the transaction is a commercial venture rather than a typical investment where the anticipation of profit is derived from the efforts of others. *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), and *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

Additionally, HAMILTON'S Memorandum as relied upon by the Florida courts correctly set forth that the HAMILTON/HODORY sale transaction was exempt under 15 U.S.C. § 77d,[3] because the offer of sale or sale was not a public offering or distribution but an "isolated transaction." And, HODORY represented that his sophistication and professional consultants were adequate protection, thus, he did not need the protection of registration laws.

Contrary to HODORY'S Petition (p.11), HAMILTON did meet the burden of proving the exemption. The registration requirement did not apply to this transaction because HAMILTON was neither "an issuer, underwriter, or dealer," 15 U.S.C. § 77d(1).

"Issuer" is defined "as every person who issues or proposes to issue any security . . . ", 15 U.S.C. § 77b(4). The stock was issued by Weiss-Hamilton Lumber Company Inc., not HAMILTON. See *Shaw v. United States*, 131

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[3] The Federal Securities Act of 1933, Sec. 4(1)

F.2d 476 (9th Cir. 1942). HODORY argued that HAMILTON is an issuer because he "controlled" Weiss-Hamilton, citing *SEC v. National Bankers Life Ins. Co.*, 324 F. Supp. 189 (N.D.Tex. 1971).[4] However the Court made it clear that the controlling person becomes an "issuer" only when involved in a transaction with an underwriter and in association with the distribution of a security, *SEC v. National Bankers Life Ins. Co.*, 334 F. Supp 454, 455 (N.D.Tex. 1971).

The HAMILTON/HODORY deal did not involve a distribution. While the Act does not define distribution of a security, it has been held to be "the entire process by which in the course of a public offering the block of securities is dispersed and ultimately comes to rest in the hands of the investing public", *SEC v. Computronics Industry*, 294 F. Supp. 1136 (N.D.Tex 1968). The mere advertisement in *The Wall Street Journal*, in June-1985, for the sale of the company (then owned by Messrs. Weiss and Hamilton) was insufficient to make the 1986 negotiation and contract between HAMILTON and HODORY a public offering or "distribution".[5] The advertised offering of the Weiss-Hamilton stock had terminated in November of 1985. HAMILTON and HODORY came together in the winter of 1986 for the sale of HAMILTON'S stock only. At

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[4] The Court issued a second opinion on Nov. 18, 1971, cited in 334 F. Supp. 454.

[5] In June, 1985, *The Wall Street Journal* announced an offering price of $1,500,000.00. In February, 1986, the offering price was $750,000.00 for Mr. Hamilton's stock only. Contrary to the claim made by HODORY, there is no evidence to show that the 1986 offering was ever advertised.

that time, the structure of the company and the basic deal were different.

Petitioner states that "there was no 'private offering' in light of the *Wall Street Journal* advertisements." (p.12) But, indeed, to clarify this very issue of "distribution", HODORY agrees and represents in paragraph 23 (Appendix 3) of the stock purchase agreement that the transaction is "isolated" and not a public distribution. In that same paragraph, to avoid any doubt regarding the sale of stock and the need for registration, HODORY states that he "has other businesses and is sophisticated enough to evaluate the risks of such purchase or has sought the advice of professional counselors". He admits that he is able to fend for himself; thus, he does not need the protection of the securities registration laws. See *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953), also, *Stottler, Stagg & Associates v. Argo*, 403 So. 2d 617 (Fla. 5th DCA 1981). In summary, the Florida courts did not disregard controlling precedent with regard to securities registration.

Statute of limitations. 15 U.S.C. § 77m provides that no action shall be maintained to enforce a liability created under the registration requirement, 15 U.S.C. § 77e, unless brought in one year.

The agreements were signed on May 5, 1986. HODORY'S action was not filed until June 3, 1987. The amended complaint stated that the stock purchase agreement was "a securities transaction" governed by the Act. The agreement between the parties states in part, that the sale is "isolated", etc., and registration is unnecessary, undisputed evidence that both parties had knowledge of the non-registration at contract. Knowledge or reason to

know of a claim is typically the basis for the running of the statute of limitations. The Federal courts have held that the statute begins to run on the date a binding contract is entered into. *Amoroso v. Southwest Drilling Multi-Rig*, 646 F. Supp. 141 (M.D. Cal. 1986); *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876 (2nd Cir. 1972); *Armbrister v. Roland International Corp.*, 667 F. Supp. 802 (M.D.Fla 1987). Since HODORY knew that the stock was not registered at contract (May 5, 1986), and the suit was not filed until June 3, 1987, 13 months later, the action was appropriately barred under 15 U.S.C. § 77m.

Estoppel. The trial court properly granted the defense of estoppel against HODORY'S registration claims because of paragraph 23 (Appendix 3) of the agreement, his control and management of the company after closing and throughout the litigation.

HODORY, then seeking rescission, never offered to return the stock. Quite the contrary, he obtained injunctive relief to continue controlling and managing the company through the course of litigation.

Likewise, HODORY was properly estopped from making fraud claims for the same reasons noted above. His alleged basis for the fraud claim, that he had discovered certain financial discrepancies after closing, was found to be "no more than bare conclusions . . . not supported by any evidence." (Appendix 4) The court's ruling was consistent with the principle that "to defeat a motion which is supported by evidence which reveals no genuine issue, it is not sufficient for the opposing party merely to assert that an issue does exist. If the moving

party presents evidence to support the claimed non-existence of a material issue, he will be entitled to a summary judgment unless the opposing party comes forward with some evidence which will change the result – that is, evidence sufficient to generate an issue to change the result." *Harvey Building, Inc. v. Haley*, 175 So. 2d 780 (1965 Fla.), at pp. 782-783; see, also, *Page v. Staley*, 226 So. 2d 129 (Fla. 4th DCA 1969).

Petitioner states (p. 7) that in ruling on estoppel Judge O'Brien did not have the benefit of *Pinter v. Dahl*, 486 U.S. 622 (1988). On appeal HAMILTON agreed that while *Pinter* requires that the parties be "in pari delicto" for the estoppel defense to lie, the undisputed evidence is that Hodory's culpability is at least equal to HAMILTON'S if not greater. In the transaction documents approved by his attorney, HODORY admits non-registration, states he is sophisticated, states the transaction is isolated, assumes the burden of due diligence, obtains the absolute right to terminate, closes on the financial information, controls the corporation, sues after one year, retains control and management of the company, never offers to return the stock, and then seeks rescission. Equity and law permit application of the defense.

The Court should deny this Writ. The courts below fully considered and correctly decided the issues without any disregard for controlling precedent or Petitioner's rights.

The issues presented by Petitioner do not warrant review by this Court. There is no conflict with *Landreth* and Petitioner's allegations are not supported by the findings.

CONCLUSION

For the reasons discussed above, a writ of certiorari should not be issued to review the judgment and opinion of the Florida District Court of Appeal for the Second District.

Respectfully Submitted,

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(813) 344-5788
Counsel for Respondent

STOCK PURCHASE AGREEMENT

THIS AGREEMENT made this 5th day of May, 1986 by and between JOHN HAMILTON, hereinafter referred to as SELLER, and ROBERT D. HODORY, hereinafter referred to as PURCHASER.

* * *

3. *Conditions precedent to closing.* The closing herein and the payment of the purchase price as contemplated herein shall be conditioned upon the following:

   A. Purchaser's verification of the accuracy of the financial statements previously supplied to them dated February 28, 1986, and those received by Purchaser subsequent to that date. In order to allow Purchaser to verify the accuracy of such financial statements, Seller will make available to Purchaser such books and records of account, tax returns or other data for such periods of time as Purchaser may request, including, but not limited to all of such documents and data for the five (5) year period immediately proceeding the date of this Agreement. Seller shall continue until the closing to furnish Purchaser with up-to-date financial data generated in accordance with Purchaser's normal accounting and tax procedures.

* * *

5. *Representations of Purchaser.* The Purchaser represents and warrants and agrees with the Seller that he will do and perform all things called for under this Agreement required of him to be performed and will cause all things required of him in this Agreement to

be performed in accordance with the terms hereof. Purchaser further represents and warrants to Seller that:

A. There are no suits, governmental proceedings or claims pending or to the knowledge of Purchaser threatened against him which might materially affect the ability of Purchaser to fulfill the financial obligations incident to the closing of this Agreement.

B. The foregoing representations and warranties are made by Purchaser with the knowledge and expectation that Seller is placing complete reliance thereon.

* * *

7. *Reliance upon and Enforcement of Representations, Warranties and Agreements.* Seller hereby agrees that notwithstanding any right of Purchaser to fully investigate the affairs of Company, and notwithstanding any knowledge of facts determined or determinable by Purchaser pursuant to such investigation, Purchaser has the right to fully rely upon the representations, warranties and agreements of the Seller contained in this Agreement and on the accuracy of any documents, certificate or exhibit given or delivered to Purchaser pursuant to the provisions of this Agreement. In the event that during the course of investigations conducted by the Purchaser, Purchaser determines such financial information or other representations or warranties are substantially inaccurate or untrue, Purchaser shall have the right, upon showing of said substantial inaccuracies or untruths, in his complete and absolute discretion, to terminate all of his obligations under this Agreement by giving written notice of such intention to

terminate to Seller. In the event of such termination, the earnest money shall be refunded to Purchaser and Seller shall have no further obligations to each other with respect to the sale of the stock of the Company.

* * *

23. The parties agree that the sale of stock contemplated herein is an isolated transaction, done for investment purposes and that the same shall be exempt from the Securities Laws of the United States and the State of Florida. The Purchaser acknowledges that he has other businesses and is sophisticated enough to evaluate the risks of such a purchase or has sought advise from professional counselors.

* * *

IN WITNESS WHEREOF, the parties have duly executed this Agreement this 5th day of May, 1986.

Signed and Sealed in the presence of :

S/_____
John Hamilton, Seller

_____

_____
Witnesses as to Seller

_____

_____
Witnesses as to Purchaser

S/_____
Robert Hodory, D.D.S.,
Purchaser

IN THE CIRCUIT COURT FOR
PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL CASE NO. 87-7958-11

ROBERT D. HODORY,
Plaintiff,

vs.

JOHN HAMILTON,

Defendant.

_____/

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT OF NOVEMBER 14, 1988

Defendant's, JOHN HAMILTON, Motion for Partial Summary Judgment, of November 14, 1988, having come on to be heard and the Court having heard argument of counsel, reviewed the filings in support of the Motion and being otherwise fully advised in the premises, finds as follows:

A. With respect to the first issue, as set forth in paragraph 1 of the above Motion, the Court finds that there is no issue of material fact, with regard to paragraph 5 a, b, c, f and k, in that Plaintiff knew or should have known the facts alleged in paragraph 5 a, b, c, f and k of the Amended Complaint prior to the closing on June 16, 1986.

B. With respect to the allegations in paragraph 5 of the Amended Complaint, subparagraphs c, d, g, h, i, j and l, the Court finds that they are mere bare conclusions by the Plaintiff, unsupported by any evidence filed in this cause beyond Plaintiff's general allegations. Plaintiff's

statements in paragraph 5 c, d, g, h, i, j and l of the Amended Complaint, after seventeen (17) months of litigation, consist of no more than mere bare conclusions and are not supported by any evidence. The Court finds, therefore, that there is no genuine issue of material fact.

C. Paragraph 3 of the Motion for Partial Summary Judgment raised the remedy of rescission, with respect to the sale of stock under the Stock Pledge Agreement. The Court does not have to reach that issue because of its prior rulings on the securities claims.

IT IS, THEREFORE, ORDERED AND ADJUDGED:

1. That Defendant's Motion for Partial Summary Judgment of November 14, 1988, paragraph 1, is granted. Plaintiff knew or should have known the facts alleged in paragraph 5 a, b, c, f and k, prior to the closing on June 16, 1986.

2. That, with respect to paragraphs 5 c, d, g, h, i, j and l, Plaintiff has failed to support his allegations with any evidence beyond mere bare conclusions and, therefore, all these allegations are dismissed.

DONE AND ORDERED, in Chambers, at St. Petersburg, Pinellas County, Florida, this 7 day of March, 1989.

/s/ GERARD J. O'BRIEN, JR.
CIRCUIT JUDGE

Copies furnished to:

James A. Devito, Esq.
Donald E. Hemke, Esq.

§ 77b(4)

The term "issuer" means every person who issues or proposes to issue any security; . . .

* * *

§ 77d. Exempted transactions

The provisions of section 77e of this title shall not apply to –

(1) transactions by any person other than an issuer, underwriter, or dealer

(2) transactions by an issuer not involving any public offering . . .

* * *

§ 77e. Prohibitions relating to interstate commerce and the mails

Sale or delivery after sale of unregistered securities

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly –

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale. . . .

* * *

§ 77m. Limitation of actions

No action shall be maintained to enforce any liability created under section 77k or 77l(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(2) of this title more than three years after the sale.